CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District.
June, 1823.

BROWN & AL.
vs.
DUPLANTIER.

EASTERN DISTRICT, JUNE TERM, 1823.

BROWN & AL. vs. *DUPLANTIER.*

Many parts of the Civil Code apply to commercial cases. When the defect of the thing sold is established—there is no need of an allegation of fraud or warranty.

An action *quanti minoris*, lies for a vendee who has sold the thing. Prescription is presumed to be waved, when not pleaded.

It is no defence to an action *quanti minoris*, that the vendee sold the the thing advantageously.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiffs allege they purchased from the defendant several bales of cotton, and particularly thirty-three bales, numbered from 107 to 139, weighing 11,829 pounds, as good and merchantable, and equal in quality to the portion of said cotton on the exterior parts of said bales; whereas, in fact, they were plated with a thin plating of good cotton, while the interior parts were filled with blue and inferior cotton, a deception that could not be discovered by the plaintiffs or their agents, at the time of the sale.

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There is an averment that the exterior cotton was worth in Liverpool, the port to which the bales were shipped, 11 3-4*d. sterl.* per pound, while the interior was only worth 9*d.* 2 *farthings*; so that, if the whole cotton had been equal to the sample shown, which was of the kind in the exterior of the bales, it would have been sold in Liverpool for £555, 17*s.* 10*d. sterling*, or $2470 50 cents; while it only sold for £490, 12*s.* 2*d.* or $2220. They paid 14 cents per pound for said cotton to the defendant, while, had they not been deceived, they would not have paid more than 11 cents.

The defendant pleaded the general issue.

There was judgment for the defendant, the district court being of opinion, that "as the plaintiffs had parted with the cotton before the institution of the suit, they thereby lost their right to the action *quanti minoris*." The judgment refers generally to the Civil Code. The plaintiffs appealed.

The testimony, taken in Liverpool, fully establishes the unfair packing; but the overseer of the defendant testified, that all the crop was ginned and packed under his immediate inspection, and no fraud was committed.

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The appellants' counsel urges, that

1. The latent defect in the bales, left to the plaintiffs the choice of insisting on a rescision of the sale, on return of the cotton, or of requiring a reduction of the price. *Civil Code*, 356, *art.* 67, 68, 70. *Casaregis*, 176, *n.* 1–10. *Cur. Phil. Commer. Terr.* 1, 13, *n.* 8, 29.

2. The right of demanding a reduction is not destroyed or affected by the sale, *Cur. Phil. id. c.* 13, *n.* 27. *D.* 21, *1*, 46.

3. Prescription was not, and must be, pleaded, 10 *Martin*, 184.

The appellee's counsel insists, that

1. This case must be determined according to the law merchant, and according to the Civil Code. 2 *Martin*, 326, 462. 4 *id.* 92. 12 *id* 498, 500. *Civil Code*, 260, *art* 7.

2. The action cannot be maintained. as there is no allegation of fraud, or a warranty, 12 *Johnson.*

3 The plaintiffs were bound to have instituted their action, within six months from the discovery of the defect. *Civil Code*, 358, *art.* 75. 11 *Martin*, 11, 16.

4. The sale of the cotton before the institution of the suit, while a loss on the sale is nei-

ther alleged nor proved, prevents the plaintiffs' recovery, *Civil Code*, 356, *art.* 70.

5. The plea of prescription is not necessary, as the plaintiffs put the time of the discovery of the defect in issue, by one of the facts, he submitted to the jury.

6. As the suit was not instituted till six months after the sale, an averment of the discovery within that time was essential, and the absence of it dispenses with the plea of prescription. *Id.* 358, *art.* 75.

I. It is incorrect to say, as a general principle, that the provisions of the Civil Code are inapplicable to commercial transactions. It is true indeed that the rules *peculiar* to commercial transactions are established by the laws relating to commerce, *Civil Code*, 260, *art.* 170, *art.* 7; but it does not follow from these rules, that a great many of the provisions of the Code are not *common* to commercial and other transactions.

It was the evident intention of the makers of the Code, that its provisions relating to the contract of sale, should regulate commercial sales as well as others. They speak of the sale of goods, *merchandise*, produce or other

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objects; when we are referred to the laws relating to commerce, it is only in regard to provisions *peculiar* to commercial transactions.

Now the obligation of a seller to explain himself clearly, to deliver the thing sold, and to warrant it to a certain extent, are equally applicable to commercial as to other sales. This court has held so in a variety of cases, as to the delivery of cotton or other merchandise, between merchants.

A planter who sells his produce to a mercant, is bound to act with that good faith, which he might insist upon in the purchase of a slave from one of his neighbors.

He has a right to require a declaration of the hidden defects of the negro, and may demand damages, if he was imposed upon. So he is bound to indemnify the merchant, to whom he sells his cotton, if his agent (even without his knowledge) have plated it, or placed a heap of cotton seed or other trash in the middle of the bale, as he would himself require indemnification, from a goldsmith, who would sell him a vase as wholly of the precious metal, if any part of it was of a baser one.

II. When once the apparent defect is esta-

blished, the remedy is independent from the existence of fraud, or a special warranty or the vendor's knowledge; for it is clear, that the price of a vessel of one of the precious metals would not be given, had it been known that the vessel purchased was not wholly, but partially so, only of pure meta, *Id.* 356, *art.* 67—69.

III. The sale of the thing may be objected to a plaintiff who seeks a rescision; for he cannot demand the whole price paid, while he has disabled himself from returning the thing; otherwise when a diminution of the price only is sought for.

IV. Every period within which a party must or is directed to institute his action, is established for the benefit of the defendant, who is conscientiously bound not to avail himself unrighteously, of this legal advantage provided for him. It is his duty to abstain from the use of it, while his just defence does not require it. When, therefore, a defendant answers the plaintiff's petition, without urging that the suit was not brought within the time fixed by law, the court is bound to conclude that the defendant, yielding to the obligations of morality,

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declines a legal advantage, which justice reproves.

The prayer of the petition is for damages, to indemnify the plaintiff, for the injury sustained, by a return of part of the price; and we think the district court erred in concluding, that the plaintiffs lost their right of action, by disposing of the cotton. Whether a vendor, who has a deceit practised on him in the sale, gain or lose by the subsequent sale of the thing, his right to the action *quanti minoris* remains perfectly the same. This subsequent sale is his own act: it could not place his vendor in a worse situation; neither do we think it may place him in a better. The second sale is at the first vendor's risk; he is not bound to account for any part of the profits he makes thereby, as he could not claim a compensation for any loss resulting from it. The excess of price paid is in the hands of the first vendor *money*, which *ex equo et bono* he is bound to refund, money had and received to his vendee's use. The latter has the right to call it out of the former's hand, and this right is independent of any posterior act which may render the purchase beneficial or burdensome, in a greater or less degree. If it were otherwise, it would follow, that the action

quanti minoris could not be supported, until the thing sold was disposed of, by the vendee, as until this, the result of the operation could not be ascertained. An argument directly at war with that of the defendant's counsel, in urging that the sale of the thing destroys the vendee's right of action.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed.

In proceeding to give the judgment, which, in our opinion, the district court ought to have pronounced, we find the following facts ascertained by the jury.

1. On the 16th of February, 1821, the plaintiff, purchased from the defendant (through the medium of a broker, who received a commis- from both parties to the sale) 98 bales of cotton, at 16 1-2 cents for 65 bales, and 14 1-2 for 33. The last parcel weighed 12,503 pounds, and $1812 99 cents were paid therefor.

2. The 65 bales were sold as prime cotton; the 33 as good fair cotton of an inferior quality. The cotton, in the exterior of the 33 bales, was of the quality it was sold for, and worth the price given.

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3. The fair cotton, in the exterior, formed but a small part of that in the 33 bales. They were plated with a thin plating of good fair cotton, over cotton of a much inferior quality; and this was not known to the plaintiffs or their agents.

4. On sales of cotton, in New Orleans, it is not customary to make any other examination, than to draw samples from the outer part of the bales,—to the depth of an inch or an inch and a half,—and rarely deeper.

5. After the purchase, the cotton was shipped to Liverpool and thoroughly examined, and the defect discovered—but there is no evidence of the precise time of this discovery. The cotton on the exterior of the bales, was then worth, in Liverpool, 2*d* per pound more than that it covered.

6. At the time of the sale, the cotton in the 33 bales, in its actual state, was not worth more then 11 cents, and $467 60, were paid above its value, and more than would have been given had the defect been known to the vendees.

7. There is no evidence of the time of sale in Liverpool, nor of the price obtained.

8. The cotton was classed and examined by a broker, paid by the vendor and vendees. The

33 bales were not sold as of an inferior quality, but as inferior to the other parcel.

9. It was turned out by the defendant's agent, and submitted on, and sold by, samples drawn by the broker.

It appears to us, the only measure of damages is the difference in the price given, and that which would have been given, had there been no deception in the bales. This difference the jury have found, and the district court, in our opinion, ought to have given judgment therefor.

It is accordingly ordered, adjudged and decreed, that the plaintiffs recover from the defendant, the sum of $467 60 cents, with costs of suit in both courts.

Livermore for the plaintiffs, *Duncan* for the defendant.

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Notice to an indorser is in all cases necessary. But the failure to give it, may be excused if his place of residence is unknown, and due diligence is used to discover it

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is a suit against the indorser of a bill of exchange, which was regularly pro-

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tested for non acceptance. The defendant opposes a recovery on two grounds:

1. Insanity, and

2. Want of due notice of the dishonor of the the bill by the drawer.

Judgment was rendered against him in the court below, from which he appealed.

As to the first ground of defence, the evidence of the case leaves doubtful the existence of any mental derangement in the defendant, except that which occasionally occurs from intoxication. But should it be admitted that he is insane, and yet left to manage his affairs, still it is uncertain, under such circumstances, what legal effect that state of mind could have on his contracts. However, as we are of opinion, that he ought to prevail on his second ground of defence, it is deemed unnecessary to examine the fact.

The holder of a bill of exchange or promisory note, is bound to give notice to the drawer and indorsers, of non acceptance or non payment, as the case may be. In presenting a bill for acceptance, when it is refused, the drawer and indorsers are by law entitled to immediate notice of such refusal. This may be excused, in some particular instances, in relation to a

drawer, when proof is made that he had no funds in the hands of the payee, &c. But it is believed, that due notice to indorsers is in all cases indispensably necessary. A delay in giving notice is sometimes excused by the absconding of either drawer or indorsers. A holder of a bill may also be excused for not giving regular notice to an indorser, whose place of residence is not known to him, provided he used reasonable diligence to discover where the indorser may be found. In the present case, notice was directed to Natchez, to both drawer and indorsers, being the place where the bill was dated. But the evidence in the case shows, that the indorser against whom this action is prosecuted, resides forty or fifty miles from that place, and within a mile or two of a post office, kept at Pinkneyville, in the state of Mississippi. Nothing in the record shows, that any diligence was used, or enquiry made, by the holders of the bill, to find out the residence of the indorser.

We are therefore of opinion, that the plaintiffs have failed to make out their case. See in support of the doctrine here laid down, *Chitty on Bills, ed.* 1821, *pp.* 257 & 275. 12 *Martin*, 181.

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And therefore, it is ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and that judgment be here entered as in case of non-suit: the plaintiffs to pay costs in both courts.

Livermore for the plaintiffs, *Livingston* for the defendant.

M. & F. GAYOSO DE LEMOS vs. *GARCIA.*

APPEAL from the court of the third district.

If an improper return day for the appeal be fixed by the judge *a quo*, an appearance and joinder in error cures the defect.

The statement of the judge is presumed to be made in, consequence of the parties having disagreed.

A certificate that the record contains all the material testimony is sufficient.

Dilatory exceptions must be proved by the party making them, unless the affirmation on which they

PORTER, J. delivered the opinion of the court. The petitioners state that they are the testamentary heirs of the late Don Manuel Gayoso De Lemos: that their ancestor died possessed of a certain tract of land, situate in the parish of East Baton Rouge, granted to him by the Spanish government, containing 1000 arpents: that this land has descended to them as his heirs; and that one John Garcia sets up a claim to 375 arpents of said tract, has entered into possession of it, and refuses to give it up. They conclude by praying, that he may be decreed to surrender it, pay damages and costs, and that their title be declared superior to his.

The defendant pleads the general issue: that there was no such person as Manuel Gayoso, or if there were, that he did not exist at the commencement of the suit: that the ancestor of the plaintiffs died in New Orleans insolvent: that the land in question was sold to pay a privileged claim, which the representatives of his estate were ordered, by the constituted authorities, to discharge: that one Richard Raymond Keene became the purchaser, who transferred it to Jacques Bunch: that the defendant is testamentary heir to Bunch, who departed this life in the year : that in virtue of these conveyances, he is subrogated to all the rights of the original mortgage creditor against the estate of Gayoso: that the heirs cannot recover, until they pay the amount of the debt, with interest; and, lastly, that the plaintiffs are barred by prescription. In a supplemental answer, the defendant avers, that Bunch, under whom he claims, exchanged for the premises now in dispute, a certain tract of land, situate in the same parish: that one Jacob Drake, lately deceased, acquired it from Keene: that a certain Say is executor of Drake, and that, in case he (the defendant) is evicted of the land now sued for, the succession of

rest, involves a negative.

Where the issue is on the life, or death of a person once existing, the burthen of proof lies on the party asserting the death.

The defendant may read a deed from his vendor, to establish any fact which it will legally prove.

Lands granted by the king of Spain did not enter into the community of acquests and gains.

The prescription of four years against minors, runs only against them for those acts where the forms of law have been pursued in the alienation of their property.

An executor to whom power is given to act beyond the year, and settle

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Drake is responsible in warranty, in consequence of having purchased the property given in exchange for that claimed by the present action.

Say was cited in warranty. He pleaded the general issue, and prescription.

The cause was submitted to a jury, who found for the defendant. The plaintiffs appealed.

The appellee has moved to dismiss the appeal, because the time fixed for its return by the judge, was contrary to law; because, the bond required by the act of the legislature, has not been given, or if given, has not been sent up with the record; and because, there is not a proper certificate of facts.

The first objection has been waved by the appearance of the defendant in this court, setting the cause for trial, and praying an affirmation of the judgment of the inferior tribunal. In the case of *Grayson* vs. *Veech*, we held, that acknowledging service, after the time fixed by the judge for the return of the appeal, had expired, was an evidence of the appellee's consent the appeal should be returned on a subsequent day, *Ante*, 134.

It is clear, that appearing and pleading to

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the estate, may act as long as it is necessary to accomplish the object.

An executor cannot sell property of his testator by private sale, although authorised to act, extra judicially. Minors' property cannot be alienatd in any other mode but that prescribed by law.

merits, waves all errors of citation, *Dyson & al.* vs. *Brandt & al.* 9 *Martin*, 497. *Febrero, lib.* 3, *cap.* 1, *sec.* 3, *n* 120. The error of the judge, in making the appeal returnable on a too distant day, is one which may be certainly waved. That it was waved cannot be doubted, for this defendant appeared and did that, in relation to his cause, which he could not have done in the tribunal, unless he was legally brought before it, or had chosen to acknowledge himself so. We may illustrate this case, by supposing one in the district court, where the defendant was cited to appear not in ten, but in twenty days. If instead of claiming the benefit of the mistake, should it be one, he answered on the merits, could he, at any subsequent stage of the cause, allege for error that he ought to have been cited at an earlier day? Surely not.

The objection, that the defendant could not legally be brought here to answer this appeal, unless security for the costs was given, is of the same kind with that just disposed of, and in our opinion, is also waved by the appellee's acknowledging himself legally before the court, in praying that the case should be examined on its merits, and the judgment below affirmed. The certificate of the judge, of the statement of

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facts, is in the following words: "The above statement contains a list of the documentary evidence and the material testimony adduced on the trial of the case." The first ground on which this statement is objected to is, that the judge had no right to make it out unless the parties disagreed, and that it does not appear on record, they did disagree. It is the opinion of this court, that the judge must be presumed to have given his certificate, on the occurrence of that event which authorised him to give it; and that if the fact were otherwise, it was the duty of the appellee to establish it. Officers of such high station, in whom the law reposes so much confidence, cannot be supposed to have violated their duty.

It is next urged, that the judge has not given his certificate in the mode pointed out by law, that he has not sent up all the testimony, and that he had no right to discriminate. His expressions are, that the record contains all the *material evidence:* if this be true, and no suggestion to the contrary is made, it would look strange to remand the cause for want of *immaterial testimony.* But it may be useful to enquire, if under the act of assembly, which authorises the judge to send up the facts, he

has not certified correctly. By the act of 1813, regulating the mode of bringing up causes to the court, the judge was authorised to make out a statement of facts. The manner in which he was to do it, was not pointed out. The consequence was, that immediately after the court went into operation under the state government, several questions on this subject were presented for decision. On examining the cases in which these questions were raised, we observe, that though it was very strenuously debated, whether *a statement of facts* could consist of the evidence taken on the trial, it was not denied nor doubted, that the judge could make an abstract of the material facts as deduced from the evidence, and send it up for this tribunal to act on, in reviewing the judgment rendered below. Making an abstract, necessarily supposes the rejection of part, and the right in the judge to decide what he shall include, and what he shall leave out in the statement he signs. If the power be thus vested in him to discriminate, if by law he has a right to separate the wheat, from the chaff, and the statute has pointed out no particular mode in which it shall be done, we cannot deprive a party of having his cause re-examined in this

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court, because the judge makes the separation, by sending up all the *material testimony*, instead of sending up all the *material facts*, as deduced from that testimony. Indeed the dispute appears to us, one rather of words, than of things.

Arriving at the merits and commencing our investigation with the plaintiffs' title, we find it to consist of a grant to their ancestor, and his last will and testament, by which they are instituted his heirs.

The first ground of defence assumed by the defendant, is, that there never was such a person as one of the plaintiffs, or if there were, he had ceased to exist at the commencement of the suit.

This plea presents one of those exceptions which are known to our law as dilatory, and in respect to which the general rule is, that they must be supported and proved by the party making them. *Pa.* 3, *tit.* 8, *law* 9. *Curia Philipica, p.* 1, *sec.* 13, *no.* 6 *and* 3. This rule however is subject to the same exception in regard to pleas of this kind, as in other matters; namely, that where the defence affirmatively set up, involves a negative, the proof must come from the other side, because in the nature of

things a negative cannot be proved. *Pa.* 3, *tit.* 14, *l.* 2. *Powers* vs. *Fouché*, 12 *Mar.* 73. The objection pleaded in this case, that there was no such person as one of the plaintiffs, contains a negative which throws the proof on the other side, that such a person did exist. That proof once given, it is the duty of the defendant to furnish the evidence which will support his other plea ; that the plaintiff was not in existence at the time of the suit; for this is an affirmation which if true, he can well establish, and the rule is that where the issue is on the life or death of a person once existing, the burthen of the proof lies on the party asserting the death. *Philips on evidence*, 152. The plaintiff has established his existence by the will of his father, and by the testimony of a witness that he lived in Spain. The defendant has not supported his, by either proof or presumptions; though the law has furnished an easy mode of doing so, if the facts in the case would have authorised it. *Par.* 3, *tit.* 3, *l.* 19.

The counsel for the defendant has referred to the *Curia Phillipica*, *p.* 1, *sec.* 17, *no.* 22, to show that where the existence of an individual is the gist of an action, it is not sufficient to

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prove that he was once alive, but that his actual existence must be established. This passage contains nothing contrary to the rules which we have already intimated must govern this case; indeed it is an authority in support of them. It is merely an enunciation of the principle, that he who affirms, must prove. By the laws of Spain if suit were commenced for property, the right to which depended on the death of another, the plaintiff was obliged to furnish testimony of the decease of the individual through whom he claimed. But if instead of the death of a third party, being the basis of the action, it was founded on his existence, as where the claim was for an annuity, pension, or salary dependent on his life, the law required proof of that existence, according to the well known maxim *ei incumbit probatio qui dicit, non qui negat.* This maxim is indeed the source from which are derived all the rules we find scattered through the books of Spanish jurisprudence on this subject of proving the decease of a person. If the death of another is alleged, it must be established—if his life is affirmed, it must be proved—but if 100 years have elapsed since his birth, this presumption will supply the necessity of offering evidence of

his having died. We have already seen on whom the affirmative devolves in this case. *Febr. Addic. t'ar. 2, lib. 3, cap. 1, sec. 7, no. 373, Curia Phillipica juicio Civil, 1, sec. 7, no 22, Merlin question de droit, vol. 1, p. 1, 2 Martin, 138, 9 Martin, 264.*

But if we were to admit with the defendant, that the proof is insufficient to establish that such a person as Manuel Gayoso ever existed, the defendant would be in no way benefitted, for then the whole estate would fall to Fernando the other plaintiff.

There are several bills of exception of record which have not been noticed on argument. They have been examined, and it does not appear to us any error has been committed by the court below ; except in refusing permission to the defendant to read the deed from the executor to Keene for any other purpose, except to support possession. We think the defendant had a right to read the deed in evidence, to shew the title under which he claimed. As however it comes up on the record, the appellee can have every benefit from it, he could have had, if regularly received in the court below.

The title of the plaintiffs is founded on a grant made to their father during marriage, and

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it has been urged that the land thus acquired entered into and made a part of the community subsisting between husband and wife. Whatever support this argument may derive from the practice which we believe has prevailed in some parts of the state to regard lands granted by the sovereign as property common to both spouses: it is certain that it is not only unsupported by authority, but that the law most positively says it shall not be common to both: but that it shall belong exclusively to the individual to whom the King grants it. *Novissima Recop. liv.* 10, *tit.* 4, *leyes* 1, 4 *y* 5, *Febr. p.* 1.

It is alleged that one of the plaintiffs has suffered four years to elapse since he has attained the age of majority, and that his claim is barred by prescription. This period of four years, within which the minor was required by the Spanish law to commence suit, applies solely to those cases where the contract was entered into in due form, and where in consequence of *lesion* in the contract, relief was sought by an action demanding what is called *restitutio in integrum*, *Febr. p.* 2, *lib.* 3, *nos.* 87, 91, 92 *and* 93. *Chesneau's heirs* vs. *Saddler*, 10, *Martin* 728. But where the property was alienated contrary

to the forms prescribed, this prescription did not apply, for as to the minor no contract existed, and consequently no action was necessary to set it aside. *Febr. p* 2, *ch.* 3, *sec.* 1, *no.* 71, 8 *Mar.* 619 : 11 *ibid*, 716, 717. It is unnecessary to examine whether the defendant's title is such one as enables him to plead the prescription of ten years, for that period has not elapsed since either of the plantiffs has arrived at the age of majority.

The main question in this cause is the validity of the sale from the executor. The facts necessary to be stated in regard to that sale are shorly these. The executor Armesto was by the terms of the will "without intervention of justice to take poesession of the testator's goods, inventory them, appraise them, and sell them." *Sin intervenga justicia alguna, tomen posecion de mis bienes, verifiquen, inventario, estimacion, y venta;* and forthe better enabling him to settle his estate, he by a subsequent clause in the will, extends the time of the executorship beyond the year given by law. Several years after the death of the testator, a decree was given by the tribunals of justice under the late government, that the executor should pay a debt due to a certain Romana Santillana. Three years after

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the decree; eight after the decease of the plaintiff's executor, and subsequent to the change of government, the executor sold at private sale, the tract of land, a part of which is now sued for. Three months after, the attorney in fact of Santillana signed a receipt, in which he acknowledged he approved of the sale, because the executor had paid him $3000 due his principal. The first question on these facts is, whether the power of the executor had expired at the time the sale was made, and this depends upon that clause in the will, by which the authority of the executor is extended for such time, as will be necessary to accomplish the object of his appointment. If the testator had the power to make his will in this manner, it necessarily follows the executor's authority did not cease, until the will was executed. The evidence shows the succession was not settled at the time of making the sale, and leaves us uninformed of the causes which retarded it. We therefore conclude, he was then in the legal exercise of the functions conferred on him by the will.

But the great difficulty remains, had he authority to dispose of the property at private sale? It is contended on the one side that he had,

because the will directs him to make an inventory, estimation and sale, without the intervention of justice; while on the other hand, it is urged that by the laws of Spain, the executor is forbidden to dispose of property except at auction; and as the land now sued for belonged to minors, the formalities prescribed for the alienation of their immoveables, must be strictly pursued.

Much weight has been attached, to the testator's authorising the executor to sell without the intervention of justice, but it appears to us, that little can be given to this circumstance. If selling at auction were one of those formalities, which belonged exclusively to sales made by executors under the decree of a judge, or the orders of a court, it might indeed be contended the testator had waved it. But the law makes no such distinction. It speaks of all sales made by them, and of course includes those made under the authority of the testator, as well as those directed by a judgment. None of the commentators within our reach speak of any exception. Would it be proper there should be any? We think not. The power conferred is extensive, and liable to great abuse. None of the formalities, therefore, which ensure publicity to

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the sale of the property, and a fair price, ought to be dispensed with. Indeed we are bound to presume that the knowledge of the existence of a law that might check the abuse of this extensive power, was one of the reasons that induced the testator to confer it.

It is next contented that the terms of the law do not prohibit private sales by executors; they only *direct* them to be made at auction. What force this argument would have in an ordinary case, need not be considered. In regard to minors' property *any other mode of alienating but that which is directed, is prohibited.* This is the language of all the books, and it is the doctrine we have repeatedly acted on. *Par.* 6, 16, 18, *id* 5, 5, 4, *Febr. p.* 2, *lib.* 3, *chap.* 3, *sec.* 1, *no.* 68, *a.* 80. *Francoise*, vs. *Delaronde*, 8 *Martin*, 625. *Chesneau's heirs* vs. *Sadler*, 10 *Martin*, 6.

We have kept this case long under advisement, to satisfy ourselves whether a distinction did not exist, in regard to sales of minors' property, made by executors, and those made by tutors. We have found in the law a difference in the formalities by which these sales are to be made, but we have found none in the necessity of pursuing those prescribed, and we dare not now introduce for the first time, the principle, that

the sale of the immoveable property belonging to a minor, no matter by whom made, can be legally made, unless the law is exactly pursued. We cannot see to what extent such an innovation would lead us. There is no doctrine in our jurisprudence more firmly established than that, which the plaintiff invokes. It makes a part of the legislation, and the policy of all those nations whose laws are derived from the same source as ours, to stamp as null and void, the alienation of the property of persons under age, when the forms prescribed for their protection, have not been pursued. A principle so extensive, and which has taken such a deep root in the institutions of the greater portion of the civilized world, should be approached with caution, and ought not, except on the soundest reasons, be infringed by this court.

It has been pressed on us, that the tutor is obliged to pursue the formalities of the law, because he holds his authority from the judge, but that the executor derives his, from the deceased. We are unable to perceive in this respect any difference between the *testamentary tutor*, and the executor: both derive their powers from the same source. And we find it laid down as law, that although the father of the

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minor, when he directs a particular thing to be sold to a certain person for a fixed price, dispenses with the formalities of alienation; yet that a general power in the will to sell, in removing the legal prohibition to alienate, does not authorise a departure in the tutor, from the solemnities necessary for the sale of minors' property. *Febr. lib. 3, cap. 3, sec. 1, no. 72.*

Lastly, it has been urged, the plaintiffs should repay the purchase money received by the executors before they can take back the land, as the price has been applied to the payment of the judgement debt of the ancestor.—This it appears can only be done when the sale has been made in due form, and the minor sue for restitution *in integrum*, *Febr. p. 2, c. 3, sec. 1, no. 86*, Lopez in his commentary on the 4th law of the 10th title of the 6th Partida, says indeed, that the warranty of the executors in a sale descends on the heirs, but this of course means a sale made according to law. Supposing this however, to be a case where the court could exercise the power of compelling the plaintiff to do equity; the proof on record does not enable us to say what is the relative value of the land sued for, to the whole tract sold. Again the vendors of the defendant are

not cited in warranty, but the possessors of the property which the appellees immediate vendor got in exchange for that now claimed.— We cannot in this suit, examine the rights of the parties growing out of that contract, and on the whole we do not see, if we had the power, that the defendant would be benefited by decreeing to him that portion of the original purchase money, which the quantity of land he holds, would authorise him to demand.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided and reversed, that the plaintiffs do recover of the defendant the tract of land mentioned in the petition, and that the appellee pay costs in both courts.

Workman for the plaintiffs, *Hennen* and *Preston* for the defendants.

LLOYD vs. *PATTERSON & AL.*

The master of a vessel has no claim to damages for the wrongfully suing out an attachment & levying it on tobacco shipped on board; which

Appeal from the court of the first district.

Martin, J. delivered the opinion of the court. The plaintiff complained, that the defendants wrongfully sued out writs of sequestration and attachment, against R. & T. H. Hasluck, un-

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der which the sheriff seized and attached on board the plaintiff's vessel, (the Ajax) then bound for Liverpool, a quantity of tobacco which was shipped on board of said vessel, whereby she was detained a considerable time, to the great expense and injury of the plaintiff, who thereby lost a quantity of freight, which he would otherwise have obtained.

is not taken out and remains in his care, on his promising the sheriff to keep it.

The defendant pleaded several, and various pleas.

The district court was of opinion that "the plaintiff has no cause of action; that he was no party to the attachment, and cannot be permitted to say it was wrongfully sued out; that he had a lien upon the tobacco attached, for one half of the freight, which he could have holden to, and as he permitted the tobacco to go out of his possession, he cannot look to the attaching creditor, with whom he has no *privity of contract*—that the only damage or penalty which the plaintiff could have claimed from the freighter, in case he had taken out the tobacco, was one half of the freight; that the circumstance of its being taken out by the sheriff, under a legal process, gives the plaiutiff no right to look to the defendants.

The plaintiff appealed.

It does not appear from the evidence that the tobacco was taken out of the vessel; indeed it appears it was not. The master consented to remain the guardian of it.

We think with the district judge that no liability results from the defendants having *wrongfully* sued out process of attachment on the tobacco, on board of the plaintiff's vessel. If the process was legally sued out, (and this is not denied) the owners of the tobacco may complain of its having been done *without a just cause*, and the defendants no doubt gave bond for the indemnification of the owners, in case of the suit being wrongfully instituted.

The master might have landed the tobacco and demanded one half of the freight, and for this he had a lien, which, it is probable, would not have been violated. He chose another alternative, viz: to become the keeper of the tobacco for the sheriff. This may give an action resulting from the contract; but none results from the suing out and executing the process of attachment; for that, whether done on just, or unjust ground, wrought no injury to the plaintiff.

For these reasons, it is ordered, adjudged

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and decreed, that the judgment of the district court be affirmed with costs.

Hennen for the plaintiff, *J. W. Smith* for defendants.

ALLEN vs. *BROWN & AL.*

Altho' there are but two members of a firm, it does not follow that their interest is equal.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. In this case the plaintiff claims in his own individual and separate right, the proceeds of a certain quantity of tobacco, which he alleges to have come into the hands of the defendants, as being the property of Allen & Gatewood—the district court was of opinion that the evidence adduced in the case did not support the allegations of the petition, and ordered the suit to be dismissed, and from this judgment of dismissal, the plaintiff appealed.

The testimony as it appears on the record, shews clearly that the tobacco, which forms the subject of the present contest, was shipped to New Orleans, and passed into the possession of the defendants, as belonging to the firm of Allen & Gatewood. There is no proof that the appellant has any right, or title to it, except

the joint interest which he may hold as a partner of the said firm. It is therefore clear that the evidence does not correspond with the allegations of the petition; and consequently does not support the plaintiff's claim to the whole amount of property for the recovery of which the present action is instituted. But his counsel insists that he may recover one half as being a joint proprietor with Gatewood, although not claimed in that capacity; and in support of this doctrine, he relies on the case of *Canfield*, vs. *M'Laughlin—Bryan & wife*, vs. *Moore, heirs, &c.* which were decided according to the principles established in the 10th law of the 17th tit. and 4th book of *Novis. Recop.*

In these cases it is true, that full effect was given to the provisions of the law therein cited; which are extremely liberal in regard to pleading. In the present case the evidence does not cure the imperfection of the plaintiff's allegations; for it does not show the amount of interest which he has in the partnership property. Because the partners are only two, it does not follow as a necessary inference, that their interests are equal. We are of opinion that the plaintiff's rights are not ascertained even by the testimony of the cause. It is there-

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fore ordered, adjudged, and decreed that the judgment of the district court be affirmed with costs.

Pierce for the plaintiff; *Morse* for the defendants.

FISK & AL. vs. CANNON.

If the plaintiff declare on a written contract, he cannot give in evidence one by parol.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This case comes upon a bill of exceptions, taken to the decision of the judge *a quo*, refusing to permit the plaintiff to give parol evidence to shew that the written contract, on which he sued, had been subsequently cancelled, and made null and void, and a new one substituted in its place.

The judge did not err. For if the original contract was merged in a new one, whether that new one were verbal or reduced to writing, it was the duty of the plaintiff to have declared on it. On referring to the petition we find the original agreement is set out, this was what the defendant came to resist. and he was not obliged to enter into an investigation of any

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other. It would be violating a rule which our courts are in the almost daily habit of enforcing, to permit a party to allege one thing, and prove another.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed with costs.

Maybin for the plaintiffs; *Livingston* and *Ripley* for the defendant.

WALTON vs. *WATSON & AL.*

APPEAL from the court of the parish and city of New Orleans.

The syndic of an insolvent cannot make an acknowledgment which will enure to the benefit of the commercial partnership of which he is a member. Impending insolvency will not excuse a want of demand of payment from the maker of a promissory note.

PORTER, J. delivered the opinion of the court.

The syndics of Joseph Walton an insolvent debtor, refused to recognise Watson, & Co as creditors of the estate; upon which, they filed an opposition to the tableau of distribution, and the court overruling it, they appealed.

The claim on which the contest has arisen, is founded on indorsements of the insolvent made on several notes, drawn by one Davidson.

The counsel for the syndics has alleged vari-

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ous matters why the appellants should not be admitted as creditors. We find it unnecessary to notice any but that contained in the second point, "that no demand of payment from Davidson, the maker of the note, has been proved."

A recurrence to the testimony proves that this objection is well taken. The witness who was called to establish the fact appears to have no knowledge on the subject, but that which he derives from another. This is not sufficient, it is no better than the declaration of the person who knew the fact, if given without the solemnity of an oath.

On behalf of the appellant, it has been contended that the acknowledgment of M'Nair, who was one of the syndics, that payment had been demanded, binds the estate. Without entering into the question whether such an acknowledgment would be good proof of demand in an ordinary case, we are well satisfied it cannot be so considered, in that now under consideration. For the syndic was a partner in the house for whose benefit that declaration (if legal evidence) would have enured, and he had consequently a direct interest in making it. If that, which syndics said in relation to

their demands against the insolvent, were to be taken as acknowledgments against others, instead of assertions on their own behalf, it is obvious the rest of the creditors would be completely at their mercy. But the law is not so improvident. In a *concurso* all the creditors are at once plaintiffs and defendants, and each must establish their claim by legal proof: nor is there any difference in this respect between the syndics, and those who nominate them.

To take the case out of the general rule, it has also been urged on the part of the appellant, the drawer was an insolvent, when the note became due, and that a demand was unnecessary. Supposing this to be correct in point of law, it is not in fact. The testimony is, that shortly after the notes were due, the drawer became insolvent. Now, so far from this being a period in the maker's affairs, when the want of a demand can be excused, it is precisely the moment when it is of the utmost importance. For exertion and diligence *may* secure the debt, and a delay in demanding payment until bankruptcy is declared, *must* deprive those who are interested in the bill from profiting by their vigilance.

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The judgment of the parish court is therefore affirmed with costs.

Workman for the plaintiff; *Hawkins* for the defendants.

FAUSSIER vs. *FAUSSIER & AL.*

The estate of the husband is not chargeable with a sum, which the notarial act shows to have been received by the wife.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN J. delivered the opinion of the court.

The syndic has appealed from the judgment of the parish court, which directs that the plaintiff be separated of goods from her husband, and that she recover $1793, which she inherited, from her husband, to be paid by the syndic, in his capacity, according to the date and nature of her privilege.

The syndic denied that the husband received the sum claimed, and the proof of his having received it is presented in a deposition of the wife's tutor, who deposes that he paid it to the husband, by a check on one of the banks—by the deposition of Lanaux, who swears he saw a receipt to this effect, in the hands of his father-in-law, by a notarial act, in which the

wife, authorised by her husband, and in his presence, acknowledged she received the money and discharges and acquits her father ex'rs. &c. This instrument is subscribed by the husband, is dated May 18, 1821, and was registered by an order of the parish court of March 1, 1822, on the following day.

It seems to us the parish judge erred. It is in evidence that a receipt for the sum thus alleged to have been paid was seen—nothing shews that it does not now exist; parol proof of the payment, was therefore improperly admitted—the production of the receipt was indispensable.

The notarial act shews that the wife received the sum claimed, and signed the discharge—nothing shews that the money came to the husband's hands. This circumstance, the only one, which can authorise a charge against his estate, not being proven, the claim ought to have been disallowed.

It is therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided, and reversed, and this court proceeding to pronounce such a judgment, as in their opinion, ought to have been given below, it is ordered,

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adjudged, and decreed, that the plaintiff be separated of goods from her husband and that she pay costs of this court, and the defendant in the parish court.

Quemper for the plaintiff, *Hennen* for the defendant.

VANNORGHT vs. *FOREMAN & AL.*

A vendor who has obtained a release from his vendee is a competent witness in an action with a third party.

Whether two witnesses be necessary to prove the loss of a title, the object of which exceeds $500.—*Quere.*

The action of warranty which the first vendee had against his vendor, is not transferred to the second purchaser without a stipulation to that effect.

APPEAL from the court of the third district.

MATHEWS, J. delivered the opinion of the court. In this case the plaintiff and appellant claims title to a certain slave as set forth in his petition; and supports his claim by an act of sale from Samuel Paxton to him, made in authentic form. The defendant Livingston sets up a title to said slave, derived from one John Black, who claims under the plaintiff by virtue of a sale made, *sous seing privé*, which is alleged to have been lost or stolen from said Black. The title being, as appears by the evidence of the case, regularly deduced from Black to the present claimant, the only difficulty, which the cause presents, relates to the sale from the plaintiff to the former.

To shew the loss of the written title, in order to be permitted to introduce testimonial proof of its contents, the testimony of Black, Vannorght's vendee, and original vendor under whom the defendant claims, was offered, and received by the district court; in consequence of the witness having been released, from the obligation of warranty, by his immediate vendor. Notwithstanding this release, the plaintiffs counsel objects to the competency of said witness; to the sufficiency of the evidence (admitting him to be competent) to prove the allegations on the part of the claimant, and also to his credibility. To establish his competency, we are referred to *Partida*, 3, 16, 19; wherein it is declared that a vendor cannot be a witness, because he is equally interested with the defendant, in consequence of his obligation to guarantee the title of the latter.

Objections to the competency of witnesses, according to our laws, are founded, on a supposed improper bias on their minds, arising either from strong natural affections, such as exist between father and son; or from interest. That opposed to the witness in the present case, is of the latter class; and if the release from his vendor destroys his interest, we

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are of opinion that his competency is thereby restored.

But although competent to testify, it is insisted on by the counsel, for the plaintiff, that his testimony, unsupported by any other, is not sufficient to establish the truth of the fact, in support of which it is introduced; because the matter in dispute exceeds five hundred dollars, and for the correctness of this doctrine, reference is made to the code, p. 310 art. 243. This article has relation to covenants, the objects of which may be appreciated in money; and differs widely from the evidence required to establish a simple fact, unconnected with any covenant. To the rules theretofore established, there are many exceptions enumerated in the code; and it is clearly not applicable to a fortuitous occurrence, when human foresight and prudence could have no agency or participation. We are therefore of opinion that the testimony of a single credible witness is sufficient to establish the fortuitous event by which a title, forming litteral proof, may have been lost. But where the object of such title exceeds five hundred dollars, perhaps two witnesses would be necessary to prove its contents. In the present case there are two who

prove the contents of the lost instrument; Black being, as already settled, competent; for we have him and Walsh, the writer of the bill of sale, who was also a subscribing witness.

The plaintiffs counsel has assumed in argument that the release of Jeremiah Black to John the witness, although it destroys the obligation in warranty of the latter to the former, does not release him from the claims which subsequent vendees have, as successors to the title derived from him, the original vendor.

When a purchaser is sued for property which he has bought, he may, nay it is his duty by law, if he means to resort to the vendor, to cite him in guaranty; provided he be bound to warrant the title of the thing sold. The action of warranty ought regularly to be brought against the immediate seller, his heirs, or successors to all his rights. See *Poth. Contrat de Vente, no.* 110. If a second vendor be evicted, the seller to him can commence an action on the warranty of his vendor, provided he be bound on guaranty to the last purchaser. But if he be under no obligation to warrant the title to the person evicted, he has no recourse on the one who sold to him; for his interest in re-

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lation to the warranty ceases; and the whole retroactive effect of this species of action is at an end. Perhaps a seller without warranty could effectually cede to his purchaser any right of action which he might have against his immediate vendor: but we are of opinion that the last purchaser is not by law subrogated thereto. See *Poth. Traité de Vente, no.* 97, and *Febr. part* 1. *b.* 11, *chap.* 10, *no.* 47. The obligation to warrant the thing sold is personal to the vendor; and the right to enforce it, is not *ipso facto* by the sale transferred to all vendees in succession. As to the credit which ought to be given to Black's testimony, we are of opinion, after weighing all the evidence and circumstances of the case, that he is entitled to belief.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Preston for the plaintiff, *M'Caleb* for the defendants.

HEWES & AL. vs. PIERCE.

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In bonds given at the custom-house for duties, the consignee is considered as owner. The person to whom the goods really belong, contracts no debt with the United States when the consignee makes the entry and gives bond for the duties.

APPEAL frow the court of the first district.

PORTER, J. delivered the opinion of the court. The defendant was the owner of certain goods, wares, and merchandise, shipped from Marseilles, in France, consigned to the house of Wm. Fisk & Co. of this city. The goods were regularly entered at the custom house, and the bond given for the duties was signed by the consignees as principals, and by the plaintiffs as sureties. The consignees became insolvent, and the sureties having taken up the bond, instituted this action to recover the amount paid by them.

The general issue, payment, and a plea that the bond was signed for the accommodation of the consignees, were pleaded.

The cause was submitted to a special jury of merchants, who, in opposition to a charge of the court, found for the defendant. The plaintiffs appealed.

The allegations which we have just stated to be contained in the petition were proved on the trial. The only other facts established of much importance were—that the plaintiffs at the time they signed the bond, did not know

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who was the owner of the goods, and that the defendant previous to the failure of Fisk & Co. had paid them the amount of the duties for which the bond was given.

Such, in a few words, are the facts of a case, the discussion of which has taken so extensive a range. We think the examination we are obliged to make into the right of the parties will be best conducted by confining ourselves to an inquiry—first, as to what support the action can derive from the statute laws of the United States, under which the bond was taken, and second—upon the general principle, that the surety who pays a debt is subrogated to all the privileges and actions of the creditor.

Upon the first point, we have not had the slightest difficulty, and a reference, to the language used in the act of congress, is sufficient to shew there is no foundation for any. The 55th section of the act to regulate the collection of duties on imports and tonnage, (3 *Bioren's laws*, 197) provides that *if the principal* in any bond which shall be given to the United States for duties on goods, wares and merchandize imported or other penalty, either by himself, his factor, agent, or other person for him, *shall*

be insolvent, or if such principal *be deceased*, and his property shall have come, &c. &c. . . . if the surety on said bond, his executors, &c. shall pay to the United States the money due upon such bond or bonds, such surety or his representatives, shall have and enjoy the like advantage, priority and preference, on the estate and effects of *such insolvent* and *deceased*, as are reserved and secured to the United States.

This act subrogates the surety to all the rights which the United States had on the principal. Our enquiry then on this branch of the subject lies within the narrowest compass possible,--- it is simply to ascertain *who was principal*; for it would avail the plaintiffs little on this branch of the case, if we agreed with them that the defendant was liable to the government on a contract for the duties, formed by the importation of his goods. The statute does not subrogate them to all the rights of the United States; it is only the right as it regards the principal, on the bond, on which the appellants became sureties.

A perusal of the different provisions found in the acts of congress on this subject has satisfied us, that *quoad* the entry of goods, and giving bond for the duties, the consignee is considered

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to stand, in relation to the government, as owner, and that he is regarded in the execution of these instruments, not as agent, but as principal. Indeed congress have expressly said so, for the 62d section of the act already quoted, declares, that for the purposes of that act, the goods, wares, and merchandise imported shall be deemed and held to be the property of the person *to whom they are consigned.* See also *Ingersoll's Digest*, 206, 207, 208, 210, 224, 229, 231.

Were it otherwise the government have poorly secured themselves against fraud, and imposition. The consignee, considered as agent, would in that hypothesis come under no personal responsibility --and in lieu of it they would have that of the owner, who is frequently a foreigner, residing in other countries, and almost always a stranger to those who accept these in struments. How wide a door this system would open to deceit, and unfair dealing, how strongly it would lead men into temptation, and how wholly inadequate it would be to secure to the United States a certain collection of the revenue, it is unnecessary for us to explain. The inconveniences which must attend it are too great to permit us to suppose it

could ever have been contemplated by the national legislature, and we close our observations on this point, by concluding with judge Story, *that it is beyond all doubt* the owners, *or consignees*, owe the duties, and that they are the persons to whom the law gives a credit. 1 *Mason*, 498.

So far then as the plaintiffs have endeavored to maintain this action, under the act of congress, subrogating them to the rights and privileges of the United States, we think they have failed.

The second point is, that by the laws of this state, the surety, who pays the creditor, is subrogated to all his rights, actions and privileges. This proposition we believe to be correct, and in our jurisprudence it is carried so far that if there be several debtors bound in *solido*, the surety of one of them, who has paid the creditor, has a right to exercise all his actions, not only against the debtor, for whom he expressly became surety, but also against the other co-debtors. *C. Code*, 290, 151. *ibid* 430, 14, 15. *Pothier, traite des obligations, part* 6, *sec.* 2, *no.* 520, *l.* 17, *ff de fid. l.* 47. *ff de locat.* Hence, in the case before us, if it should appear the defendant owed the United States, on a contract created by the

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entering of his goods at the custom house, there is no doubt the plaintiffs are subrogated to all the rights which accrued to the government under that contract. This compels us to an examination of a question, on which it appears two of the judges of the supreme court of the United States sitting at *nisi prius* have expressed opinions, directly in opposition to each other, and on which we feel there is considerable difficulty. For, on a matter, connected with the fiscal regulations of the general government, *we* may well doubt, when the judges of that court are found to differ.

We have anticipated on the first point many observations that might properly have found a place here. The provisions of the statute already quoted, shew that *quo ad*, the importation of goods, and their entry, the consignee was not only considered, but declared to be the owner. This appears to us to preclude all enquiry whether another person be not responsible as owner, for there cannot be two owners for the same thing Joint ownership indeed, when several persons have a right to claim portions of a thing the law recognises, and the mind readily conceives, but the moment one person is made entire owner, no other person

can he held such. The very word *ex vi termini* excludes the idea of participation. We cannot therefore raise liability on the ground that the property belonged to the consignor, when the United States themselves have said that for the purposes of revenue, that property shall be taken to belong to the consignee.

Deciding thus, in pursuance to the strict letter of the law, we give effect to the intention of the parties. For independently of the presumptions which belong to such a transaction, we have express evidence that the security was furnished by the plaintiff, from motives personal to the consignee, and from an understanding between them, that they should accommodate each other, by mutually signing bonds of this kind:—we make the provisions of the statute do justice; for the defendant has already paid Fisk & Co and it is more equitable the plaintiffs who trusted the consignee should loose by him, than that the defendants should be held responsible not only for his own contract, but for those of others; and finally, we promote the ease and convenience of trade, for it would greatly cramp its foreign operations, if the shipper of the goods, after forwarding to the consignee funds to pay the duties, was obliged, in

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addition to the right given to government on his goods, to be subject to the collateral engagements, which that consignee and other persons might have entered into.

The judgment of the district court is therefore confirmed with costs.

Maybin for the plaintiff, *Ripley* for the defendant.

MAYHEW vs. *PAXTON*.

Appeal dismissed for want of a statement of facts, &c.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This appeal has been taken without a statement of facts, bill of exceptions, evidence taken down by the clerk, or without its appearing that the cause has been tried on written documents. It comes up with the same certificate which we held in the case of *Moulon* vs. *Brandt*, to be insufficient. 10 *Martin*, 669.

It is therefore ordered, adjudged, and decreed, that the appeal be dismissed, with costs.

Smith for the plaintiff.

MONTILLET vs. BANK OF U. STATES.

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MONTILLET vs. BANK U. S.

He who undertakes, tho' gratuitously, the business of another, is bound to indemnify the latter from the conseqnence of his neglect.

A bank is responsible for the acts of the notary it employs.

APPEAL from the court of the first district.

MARTIN J. delivered the opinion of the court. The plaintiff stated that he deposited in the office of the defendants a promissory note for collection, in order that if not paid at maturity, it might be protested and due notice given to the endorsers, according to the laws, usages and customs of banks and merchants, which the defendants promised to do, faithfully and diligently, for a valuable consideration to them paid by the plaintiff, yet the defendants did not faithfully perform their said duties, but did so carelessly, negligently and illegally perform it, that A. L. Duncan, one of the endorsers, was exonerated from all liability.

The general issue was pleaded; there was judgment for the defendants, and the plaintiff appealed.

The plaintiff introduced in evidence, in the court *a qua*, the record of the suit in which Duncan was discharged and the proceedings against the creditors of the maker, payee and anterior endorsers to establish their insolvencies.

The cashier of the branch bank of the Uni-

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ted States at New Orleans deposed that there is a notary public, employed by the branch, to protest upaid notes—that after the protest, he returns the note and protest, with his charge of two dollars, which are immediately charged to the owner of the note and paid to the notary. Before the first of December last, this notary was not required to give security. The bank charges no commission for collecting notes—nor does it receive any part of the two dollars charged.

It was admitted that the note, mentioned in the petition, was deposited in the branch for collection—and that on the 26th of December 1820, Pedesclaux was the notary employed by the bank to protest notes.

The clerk of the supreme court was introduced to establish the amount of the fees paid by the plaintiff, on the appeal, in his suit against Duncan—those of the district court were admitted.

The defendants introduced three witness, Robel, Kerr and Michoud, to prove that the note had been fraudulently obtained from the payee—and that partial payments were made on it.

The record of the suit against Duncan, shows

that he was exonerated, because the notice of the protest was given by the notary, to a person believed to be his agent, but who did not appear to be a proper person to whom such notice might be given.

The district judge considered the defendants as gratuitous agents, and as such liable for gross negligence only.

Banks hold themselves out as the agents of owners of notes or negotiable paper; they find their interest in acting as such. But even, if they derived no advantage from it, they would be bound to act correctly in the performance of the assumed duty. No one is bound to attend to the concerns of another, even when a compensation for the trouble attends it, yet he who undertakes it, even gratuitously, is bound to indemnify the person whose business is undertaken from the consequences of the agent's negligence.

In the case of *Crawford* vs *the Louisiana state bank*, determined in this court a few days ago, the principal, indeed the only important question in the present, was examined, and we held that the holder of a bill, lodged for collection, is bound to use the same diligence to give notice of non-acceptance, as an endorser.

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See the authorities there cited and reasons given.

It cannot avail the defendants that the plaintiff neglected suing anterior endorsers.--- It suffices that by the defendants' neglect he lost a recourse against Duncan—nor that the note may originally have been obtained by fraud, while it is not urged that the plaintiff participated therein.

The bank are responsible for the conduct of the persons they employ. The notary, in undertaking to give notice, did so as a private individual. It is no part of his official duties.

It is therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff recover the balance of the note, viz: the sum of eight hundred sixty dollars, with interest from the inception of the suit and costs in both courts.

Morse for the plaintiff, *Smith & Conrad* for the defendants.

TURNER vs. *COLLINS.*

The court of probates has not jurisdiction of a demand against a surviving partner for a partnership debt.

If books which were delivered to be bound, are not returned, an attachment will lie for their value.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The petitioner states that on the 12th of February, 1822, he placed in the hands of Francis Croft, one of the firm of Collins & Croft of Philadelphia, a complete set of Rees' Cyclopedia, for the purpose of having the same bound, and returned in a reasonable time, that they have failed to comply with their engagement, and that he is entitled in consequence of said failure, to recover the price which the said books cost him, with damages and costs.

An attachment is prayed for against the property of Collins & Croft, and judgment against Collins, the surviving partner.

The attorney, appointed in the court below, pleaded several pleas in defence, which, in argument before this tribunal, have been reduced to the following points.

1st. That the plaintiff's cause of action, as set forth in his petition, will not warrant or authorise an attachment; as it is not alleged that the property of the plaintiff was either lost or so damaged by the defendant's neglect, as to

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resolve the obligation of re-delivery, into specific or certain damages.

2d. That the cause is exclusively of probate jurisdiction.

3d. That the shipment of the books, and the undertaking to have them bound and re-delivered, were out of the course of the business, in which Collins and Croft were engaged, and as there is no proof that the books ever reached Collins, he cannot in any manner be made responsible.

The 2d. point which supposes a want of jurisdiction is the first to be examined, for if found correct, an inquiry into the others will be unnecessary.

Repeated decisions of this court. grounded on the provisions of the Civil Code; have settled, that when an estate is vacant, or represented by heirs who have accepted with the benefit of an inventory, the court of probates has sole and exclusive jurisdiction of the liquidation and settlement of all demands against it, and that all persons who have claims must present themselves there for payment. If then the demand were against Croft's estate, there can be no doubt that the district court could not take jurisdiction of the cause; but

the question here is, whether the exclusive jurisdiction, which the court of probates exercises over the estates of deceased persons, prevents property belonging to their successors, which may be held in common with another, from being seized by attachment, on a suit against the joint owners?

We think it does not. The moment the partnership is dissolved by the death of one of the partners, the survivors and the heirs of the deceased become joint owners of the property belonging to the partnership, and the former have a right to a division. For this purpose, the court of probates has not exclusive jurisdiction; any of our district courts can rightfully take cognizance of a suit for that purpose. If this position be correct, and we see no reason to doubt it, it would seem to follow as a consequence, that a seizure made by a creditor, the effect of which, as to the succession of the deceased, is only to produce a partition of the property held in common, can be made under the authority of any of our courts, who have otherwise jurisdition of the person, and the amount claimed.

On the first point we are of opinion the claim of the petitioner fully authorises the writ of at-

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tachment, if it be true, as he alleges, (and all the allegations in the petition for the purpose of this enquiry must be taken as true,) that he delivered his books to the defendant, and that the time is elapsed within which they were to be returned, the latter most assuredly owes damages for the non execution of his agreement, and a very proper criterion of these damages is the price which the property cost. *Civil Code*, 268, 42 If they were even delivered, without an express stipulation as to the time they were to be given back, but with a promise that they should, suit might be brought for a non compliance of this contract within a reasonable time, and what would, or would not be a reasonable time, appears to this court, a question to be investigated on the trial on the merits, not on a motion to dissolve the attachment.

Neither can the enquiry suggested by the third point, be gone into at this stage of the proceedings. Whether the contract were binding or not, cannot be examined on a motion, the object of which is to ascertain whether the defendant be properly in court.

It is therefore ordered, adjudged and de-

creed, that the judgment of the district court be annulled, avoided and reversed, and that this case be remanded to the district court to be tried on its merits, and that the appellee pay the costs of this appeal.

Preston for the plaintiff, *Morse* for the defendant.

ROBSON vs. *EARLEY.*

Possession is not evidence of property in a note, the interest of which, on inspection, appears to be in another.

APPEAL from the court of the eight district.

PORTER, J. delivered the opinion of the court. The defendant was sued on a promissory note which he had executed in favor of the plaintiff. When produced on trial, it appeared to be assigned by the payee to W. & D. Flower. An objection was taken to its being read in evidence, as the legal interest in the note was in the assignees; the plaintiff applied for leave to strike out the endorsement he had made on it, the court refused him permission to do so, and gave judgment for the defendant.

This appeal brings before us a case involving the very same principle with that lately decided in this court, in the suit of *William & D.*

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Flower vs. *Thompson.* We there held that possession of a bill was not in itself evidence of property, when the legal interest appeared to be vested in another party. That case decides this; and we refer to it for the several authorities, on which we came to the conclusion there expressed. The bringing up this case so soon after the decision of that just referred to, has induced us to look again into the books which afford us information on this subject, the only thing we have found worthy of remark is, that in the case of *Welch* vs. *Lindo*, the supreme court of the United States, decided that the mere possession of a note, which the plaintiff had assigned to another, *was not evidence of property* without a reassignment or receipt, and that in the case of *Dugan* vs. *the United States*, they declared, after an examination of all the cases, which they state, cannot be reconciled, that possession of a note or bill of exchange *was evidence of property*, although the possessor's endorsement was on it, 7 *Cranch*, 163—3 *Wheaton*, 183. We see no reason to doubt the correctness of the opinion already expressed by this court.

It is therefore ordered, adjudged and de-

creed, that the judgment of the district court be affirmed with costs.

Preston for the plaintiff.

NORTON vs. ORMSBY.

A lessee, after transfering his whole interest in the lease, cannot exercise the rights of a sub-lessor.

APPEAL from the court of the parish and city of New Orleans.

MARTIN J. delivered the opinion of the court. The petition states that a writ of seizure issued out of the parish court, in favor of the present defendant, against the goods of M'Carty, for about four hundred dollars, claimed for the rent of a certain house, and premises, due to the present defendant by M'Carty—that the sheriff seized all the goods there found—a part of which belonged to third persons; that the present defendant released all the property belonging to third persons, except that which belonged to the present plaintiff, consisting of two carts, &c. which he claims.

The answer avers that the property claimed is liable to the rent due to the defendant—that the goods of M'Carty are insufficient—that the plaintiff's property is peculiarly liable, as at the time of the seizure, he was M'Carty's partner.

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in the occupation of the premises leased by M'Carty

There was judgment for the plaintiff, and the defendant appealed.

It appears that six notes subscribed by M'Carty, payable to the defendant, were sold. They all bear date of April 5th, 1822, and, except one, are attested by H. M'Lean. One of them is for four hundred dollars, payable on the 15th of May and June, following -- three of one hundred dollars each, payable in July, August and October.

Hotchkiss deposed as to the seizure of the property, and that the rent of the premises, (on which the seizure was made,) was to be paid by M'Carty and Donaldson. The plaintiff was to provide an ostler and attend to the stables---was to receive one half of the profits.

Dean deposed also as to the seizure.

So did the deputy sheriff, who deposed he surrendered all the property that did not appear to belong to M'Carty, or the plaintiff—M'Carty's property was afterwards surrendered to his syndic. There was also in the sheriff's hands three *fi fas*, against M'Carty's goods.

M'Carty, deposed that the plaintiff was enga-

ged with him in keeping the stables. He was to superintend them and find an ostler, and was to receive half of the profits. The deponent's syndic sold the property seized, for six hundred dollars, including the unexpired part of the lease.

Stringer deposed, that, as syndic of M'Carty's creditors, he received from the sheriff the property seized for rent, with the consent of the defendant's attorney. That he sold it for six hundred dollars and upwards, including the unexpired part of the lease, amounting to two hundred and forty dollars—two hundred and seventy dollars are claimed as law charges—other sums are due to the notary, sheriff and clerk of the supreme court.

M'Lean deposed, that the notes, annexed to his deposition amounting to eight hundred dollars, were given by M'Carty to the defendant, for the lease of the houses, stables and appurtenances, sold by Vannorght to M'Carty. He understood M'Carty gave another note, for four hundred dollars to the defendant, for the lease.

On his cross-examination, the witness deposed that he drew the notes and delivered them to the defendant. As well as he recollects, there was no consideration given for them. He has

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often heard Vannorght say he was largely indebted to the defendant, and wanted to secure the amount of the lease to her and her children. He has no hesitation in saying that Vannorght's intention was to prevent others from taking the property.

It is contended that the defendant is an assignee of the lease, and may exercise the right of a lessor, in compelling the payment of the rent.

The evidence shew that Vannorght, the original lessee, *sold* his lease, (that is to say the right of occupying the premises during the unexpired part of the term, for which they had been leased to him,) to M'Carty, for a specific sum, which he directed to be paid to the present defendant, and that, for this purpose, M'Carty executed six promissory notes.

Vannorght, the original lessee, had a right to make a sub lease, or to transfer his lease. *Civil Code*, 374, *art.* 9

If he had made a sub lease, the sub-lessee would have been bound to pay him the rent, as to a landlord, and would have been entitled to claim from the sub-lessor whatever a lessee may claim of a landlord. If by accident the buildings leased had been totally or partially

destroyed, the sub lessee might, according to the nature of the case, have claimed a diminution of the rent or the cancelling of the lease. *Id art.* 20.

By transferring or selling his lease, Vannorght, as he did not undergo the obligations of a sub-lessor, did not acquire any of a sub-lessor's rights or privileges. He had no rent to demand. The consideration of the sale, or transfer, does not differ in its nature from the price or consideration of the sale of a tract of land, a chattel, an incorporeal right, or a debt.

This price, once agreed upon, might have been retained, even if the leased buildings were consumed by fire. The defendant, to whom this price was to be paid, took notes payable to herself, with the consent of Vannorght, the vendee, the object of whose bounty she was. Nothing shews that either Vannorght, or she, contracted, towards M'Carty, the obligations of a sub-lessor.

It is true, one of the witnesses deposes, that M'Carty was to pay the *rent*, and this he heard from M'Carty and the plaintiff. But M'Lean, one of the defendant's witnesses, who was the person who drew the notes, expressly swears, that the notes were "the price of the

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lease, sold by Vannorght to M'Carty." It does not appear that Vannorght retained any interest in the leased premises, nor transferred any to the defendant, except the right of receiving the price, for which the lease was sold.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be affirmed with costs.

Lobdell for the plaintiff, *Preston* for the defendant.

DEBUYS & AL. vs. *YERBY, EX.*

An attachment will not lie against a non-resident executor.

An attorney appointed by the court, cannot give jurisdiction by pleading informally.

APPEAL from the court of the parish and city of New Orleans.

PORTER, J. delivered the opinion of the court. This action was commenced by attachment against an executor, a resident of the state of Mississippi, who had taken out letters testamentary there.

The attorney appointed to defend the absent debtor, pleaded that he was not liable to be sued, in the manner and form, in which the action was brought; and that the facts alleged in the petition were not true.

It appears to the court that there are insur-

mountable objections to the course which the plaintiffs have pursued.

By our laws *the debtor* must reside permanently out of the state, to authorise the writ of attachment. The affidavit in this case, states that the *estate* of H. Hunter is indebted to the petitioners. This allegation does not bring the plaintiffs within the act. The person indebted must be a non-resident, and as the executor was not personally indebted, his absence could not be a sufficient ground for this proceeding.

Property found in our state, belonging to the succession of one who has died abroad, and left no heirs here, is a vacant estate, and must be administered by a curator; and when a creditor wishes to be paid out of it, he should obtain letters of curatorship. 12 *Martin*, 106.

Decisions in one of our sister states, under laws nearly similar to our own, are in conformity with the ideas we have uniformly expressed on this subject. See 2 *Dallas*, 73, & 97.

The court of probates, it appears to us, had exclusive jurisdiction of this case, and an attorney appointed in the court below, could not by an informality in pleading give jurisdiction,

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when the whole proceedings were *coram non judice*. It is therefore unnecessary to examine if the pleas put in, were sufficiently formal.

It is therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that there be judgment against the plaintiffs, as in case of non-suit, with costs in both courts.

Canon for the plaintiffs, *Preston* for the defendants.

ROGERS vs. *PARMETTI*,

Answers to interrogatories cannot be divided.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court.

The plaintiff annexed to his petition an interrogatory, calling on the defendant, to say whether the signatures affixed to the notes, on which the suit was brought, had not been written by him.

The defendant answered they were, but that he had never received any "legal, valuable or good consideration therefor."

The plaintiff filed an exception to the last part of the answer, on the ground that it was uncalled for by the interrogatory. The court sustained it, and gave judgment for the plaintiff.

The affirmance of this judgment depends on the correctness of the opinion of the court below, directing that part of the answer, which sets up a want of consideration, to be stricken out. We think the judge erred in so deciding. The Civil Code, in express terms, forbids it *Civil Code*, 314, *art.* 254. Such also appears to have been the ancient law. *Curia Phillipica, p.* 2, *sec.* 4. *Confesion, no.* 3 *Febr. lib* 3, *chap.* 1, *sec.* 7, *no.* 285, and in conformity therewith have been the decisions of this court. 2*d Martin*, 277. 11, *ibid. Bradford's heirs* vs. *Flower*, 217.

As to the objection drawn from the general terms in which the want of consideration is set up, we think the plaintiff cannot now be benefitted by it. If the answer were not sufficiently definite to enable him to meet and disprove it—he should have filed supplementary interrogatories, and compelled the defendant to make more explicit declaration.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged, and decreed, that there be judgment for defendant, as in case of a nonsuit, with costs in both courts.

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Smith for the plaintiff, *Morse* for the defendant.

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APPEAL from the court of the first district.

Third parties to an act, are those who are not parties to an instrument by which their interest in the thing conveyed, is affected.

The vendor of an immoveable who does not record his lien in the parish where the object is situated, loses his privilege on it. A mortgage recorded without an order of the judge, operates as notice to third parties.

PORTER, J. delivered the opinion of the court. Three of the creditors of Smith's estate demand that they should be placed on the tableau of distribution, as privileged and mortgage creditors, and be paid in preference to others, *viz:* the heirs of Trudeau, who are the vendors of real estate, found in the bankrupt's possession at the time of his failure; and James Morrison, and James Whitehead, who assert they have obtained mortgages on it.

The heirs of Trudeau, in the year 1816, sold a plantation and slaves, to Smith, the insolvent, situate in the parish of St. Charles. The act of sale was passed before the parish judge of the parish of St. James, and a special mortgage was expressed in it. On the 17th of March, 1821, without any order of the judge, this instrument was recorded, in the parish where the property is situated. The purchase money, expressed in the deed of conveyance, was one hun-

dred and twenty five thousand dollars; fifty ty thousand dollars of which sum were paid Smith previously to his failure. Since which the heirs, under an order of seizure, have caused the plantation and slaves to be sold, and have become the purchasers themselves, for eighty thousand dollars.

Morrison's claim is founded on an act, passed in the state of Kentucky, which pursues the common law form of giving a mortgage. The deed expresses that Smith has sold the premises to Morrison, and contains a clause that in case the vendor should pay the vendee, the sum of fifty thousand dollars, the sale is to be void and of no effect.

Whitehead's arises from a judgment given in this state, and duly recorded in the office of the parish judge of the parish of St. Charles, on the 17th May, 1821.

In the argument of the case, the two last mentioned creditors have united in their efforts to destroy the claim of Trudeau; which, if admitted, leaves nothing for either. We shall therefore first proceed to examine it.

A most extensive range has been taken in the discussion, and as is generally the case, in causes of this magnitude, questions have been raised

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and examined, which are not necessary to be considered in the decision. The validity of the pretensions advanced by the vendor, will, we think, be found to depend entirely on the meaning to be given to particular expressions in one of our statutes.

In support of his claim, it has, however, been pressed on us, that his right is one of the most sacred nature, which cannot be touched, or impaired, without violating the principle of property itself. We confess to be unable to see the subject in that point of view. The right of the vendor to be paid comes from the law, as does also the mode of carrying that right into effect; his claim possesses therefore, no higher character than any other; except so far as the law has conferred it. To enter into an enquiry on other grounds, would lead, we apprehend, to any thing but a satisfactory result. If gone into, cases might be readily supposed, where the demands of other creditors would have as strong equity to recommend them. A man who lends his money, to enable the purchaser to make the first payment due on the price of a tract of land, in reason, in justice, and in *foro conscientiæ*, has as much right to be paid out of the proceeds of the land, as the

vendor, who asserts a privilege for the balance due him. The authorities cited by the counsel in behalf of the other claimants establish, that neither at Rome, nor in Spain, did the vendor, who sold on a credit, retain a privilege on the property, if the sale was followed by delivery. In France at this day, the privilege of the vendor is lost, if not recorded in the manner pointed out by the particular legislation on this subject, *Code Nap.* 2108. These shew in a most satisfactory manner, in what light the legislators of those countries viewed this preference, and how entirely it is the creature of positive law.

It has been contended that the mortgagees are not third parties in the sense of the law, and that they stand in no better situation with respect to the force, and validity of the mortgages, than the insolvent himself could. We understand by the term *third parties*, all persons who are not parties to the contract, agreement, or instrument of writing, by which their interest in the thing conveyed; is sought to be affected. It is not pretended here, that Morrison was a party in the original sale, and there appears to be as little ground for contending that he has become so since, or that he stands in the same place as Smith, his vendor. The purchaser of

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property may, it is true, by subrogating another person in his right, put him so entirely in his place, that he will have no higher claims on it, than he had. But it is clear, that under our law, a vendee may acquire a title to real estate, exempt from the burthens which were attached to it in the hands of the person from whom he purchased, or discharged from the privileged claim which other persons had on it. This position my be illustrated by supposing in the present case, that the heirs of Trudeau had sold the property by a deed of conveyance, which negatived the fact of any lien, mortgage, or privilege being retained. Under such circumstances, if Morrison and Whitehead had purchased the land, they would have held it free from the incumbrance of this claim, though in the hands of Smith, it would have been subject to it. For the purpose then, of shewing that the vendors had abandoned their right, or lost it by any other means, the second purchaser would be a third party. We are unable to see any difference between a vendee, and a mortgagee, and we conclude that as a vendor may by his own act, give up, or lose his privilege, it follows as an undeniable consequence, that those who have subsequently ac-

quired an interest in the property, should have a right to shew that the lien which would have affected it in their hands, has been lost to him, in whose favor it existed.

We now come to what we consider the great question in this case; and that is, whether the lien which the heirs of Trudeau set up, as attaching on the property sold by them, was one of those, which the legislature, by the act of 1813, required to be recorded. The enquiry lies in a narrow compass, and as already observed, on a correct interpretation of a single phrase used in that act, will depend the respective rights of the parties before us.

The expressions in the statute are *"all liens, of any nature whatever, having the effect of a legal mortgage, which shall not be recorded agreeably to the provisions of this act, shall be null and void."* To arrive at a just conclusion, in construing this clause, it becomes necessary to examine what is the effect of a legal mortgage, and that once ascertained, to enquire next in what does the privilege differ from it. As the law itself has spoken on this subject, it is better to refer to it than to trust to any deductions of ours. According to the civil code, the effect of a mortgage is, that the mortgagee has

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the benefit of being preferred to the mere chirographic creditors, and even to the other mortgagees, who are posterior to him in the date of the mortgage, or its registry, *Civil Code*, 460, *art.* 9. The same authority tells us the privilege is the right, which the nature of a debt gives to a creditor, and which enables him to be preferred before other creditors, even those who have mortgages, although anterior in time. *Civil Code*, 368, *art.* 68. It is difficult then, to perceive what is the difference in their *effect*, except that the privilege is of a higher nature. They both confer a right, which gives a preference over other creditors,—they both attach on the property of the debtor, and they are both liens, given by the law, independent of the express consent of the parties.

But it is argued, that a privilege has not the effect of a legal mortgage, because the latter operates on all the property of the debtor; the former only on a particular portion. We do not see what difference this makes, on the part to which the lien attaches; the effect on it is the same, whether other parts of the debtor's property be liable to it, or not. The object of the law was to secure third parties against latent incumbrances on the thing in which they *bona*

fide acquired a right. It is only the effect of the lien on the property acquired, that can form the proper subject of enquiry, and it must be by its operation on the thing alienated, that we can correctly ascertain whether or not, the lien has the same force, as a legal mortgage would have had.

If this should appear doubtful, and we recur, as we are directed to do, in cases where the expressions of the legislature are not clear, to the reason and spirit of the law, and the causes which induced the legislature to enact it, *Civil Code*, 5, *art.* 14, a strong argument is derived in favor of including the vendor's privilege as one of those liens, which were directed to be recorded. The causes, which induced the passage of that law, were latent claims, attaching to property in the hands of innocent persons, producing great injustice in particular cases, and doing an injury to the public by checking the free transfer of property. The object of passing the act was to remove these evils, and a construction, which would leave them in force, must be resisted. Now, the privilege of the vendor, which is not found recorded in the parish where the property is situated, is just as much within the spirit of the law, as the lien

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of a wife for her dower. It produces as great an injury, and we are bound to believe that as it made a part of the evil, it was intended to be embraced by the remedy.

It has been also urged, that if it had been in the contemplation of the legislature to include the vendor's privilege, among those which are to be recorded, they would have used the expression, "all liens whatsoever," not "all liens having the effect of a legal mortgage." It is true the former expressions would have had the effect stated, and would, perhaps, have presented less ambiguity, but the not using them, does not by any means prove that the words, found in the act, have not the same meaning Indeed we draw, from the very terms which the legislature have chosen, a strong argument in favor of the idea, that the claim of the seller of immoveable property, was to be embraced by them. For, if they had intended to confine the necessity of recording, to legal mortgages alone, it may be fairly urged, they would have followed the natural mode of conveying that idea, and said that all legal mortgages whatever, that were not recorded agreeably to the provisions of the act, should be null. Instead of which, they have

declared that all liens whatsoever, having the *effect* of a legal mortgage, should be recorded. From which, we think, the inference is irresistible, that they conceived there were liens which *though not called legal mortgages, had the effect of them*; that they intended to include these liens, and to guard against their operation. The question, to be sure, recurs were privileges meant by the expression "all liens"? An attentive consideration of the law satisfies us they were. *Conventional* and *judicial* mortgages had already been provided for; the terms used, we have just seen, meant something more than *legal mortgages*; there remained then no other liens to be acted on but *privileges*, and it was to embrace them these words were used; or else they were used to no purpose. But this, the known rules of construction forbid us to presume. 6 *Bacon*, 380.

Nor is it a matter of surprise that the legislature should have conceived that, by the expressions used, they acted on liens, such as that now under examination. The discussion on this subject leaves it as a very doubtful question in our minds, whether the privileged mortgage be any thing more or less, than a legal mortgage. But without intending to decide that

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question, it is certain that if they be different, a great deal of confusion exists in the Spanish law, respecting them, and that the distinction is not well settled in our own. The counsel have referred us to the *Curia Philipica*, where the very highest privileges known to our laws are called tacit or legal mortgages. *Curia Phillip. lib.* 5, *chap.* 3, *Hypoteca*, 364, *art.* 31, 32, 33, 34 Febrero also designates them by the same name. *Juicio de concurso*, *lib.* 3, *chap.* 3, *sec.* 1, *no.* 101. So late as the year 1817, we find the general assembly of the state, denominating the lien of a builder, "*a privilege*, or *legal mortgage*." The legislature who passed the act of 1813, then, it may be readily believed, did not understand the privileged mortgage, as having a different effect from the legal one. Indeed they have furnished us with conclusive evidence to the contrary. For in the third section of that very act, they state that minors, insane persons, and absent heirs, shall continue as heretofore to have a *tacit and privileged mortgage*, on the property of their tutors, curators, and administrators, according to the principles established by the digest of the civil law.

The cases, heretofore decided in this court,

under the act of the legislature, have been referred to, but although the point now made, was not brought forward for decision in them, yet, the opinions given, in those cases, intimated views of the question, adverse to the pretentions now advanced by the vendor. The first was *Lafon* vs. *Sadler*, (4 *Martin*, 476,) in which it was held that the privilege of the vendor need not be recorded, because his lien existed independent of any instrument of writing. The court, however, stated that if a written contract had been necessary, to establish the plaintiffs' right, to recover, the defendant might, perhaps, have resisted its introduction, unless recorded pursuant to law. In the year 1817, the legislature provided that the builder must enter into contracts in writing, for all sums above five hundred dollars, and have them recorded, or cease to enjoy either a tacit mortgage, or privilege. The case of *Jenkins* vs. *Nelson's syndics*, 11 *Martin*, 437, was a decision on a contract governed by these statutes, and the court there said that the writing, establishing the privilege, was perfectly of the nature of those mentioned in the act of 1813, in which no mortgage is stipulate, but in which the law raises a tacit one.

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We therefore, conclude, that the privilege of the vendor, to have effect against third parties, must be recorded in the parish where the property is situated, and that in this case, the heirs of Trudeau can only be paid in preference to other creditors who have mortgages, posterior to the time their lien was put on record.

The next question which the case presents, is, whether it was put on record, pursuant to law. It has been already stated, that the order of the judge is wanting, and in consequence of this defect, Whitehead contends that his mortgage, which was duly enregistered in the office of the parish judge, two months before, is entitled to a preference.

The article of our code, which it is contended, requires this formality, on pain of nullity, after declaring that mortgages shall have effect against third persons, being of good faith, from the day they are recorded, provides " that this recording shall not be made after the expiration of the legal term, without an order of the court given for that purpose, *que sur un ordre du juge, rendu a cet effet.*

There is some difficulty in knowing what court, or judge is meant by these terms, bnt admitting that it is the district judge, or district

court, we are of opinion, that if the instrument be recorded without their order, that it operates as a notice to third parties, and that all the objects of the law are satisfied by it. The clause just cited, is merely directory to the keeper of mortgages, and if it were not introduced for his protection, it is difficult to see for what reason such a formality was prescribed. The mortgage is entirely distinct from it, its validity is independent of it; and although the officer, whose duty it was to receive the instrument, might have refused to enregister it without the order, yet if he did choose to run the risk of doing so, we see nothing in the law, which authorises us to say that a *bona fide* mortgage, thus put on record, shall not operate as a notice, to persons who go to those records in order to ascertain what liens are on the property. The law does not direct the judge's order to be recorded, with the mortgage.

We have lastly to enquire into the validity of the instrument by which Morrison claims to be paid as a mortgagee creditor. It is objected that it has not the form required by our laws, for acts of mortgage, and that instruments of writing, tending to affect real estate, must pursue the *lex loci rei sitæ*. This ques-

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tion we find it unnecessary to determine, for if the instrument be not a mortgage, it is a sale of the premises. We shall give it effect therefore, in the former character, because the party claiming the benefit of it, has relied on it as such. In this way too, it will be least burthensome to the other creditors, and will enable us to give effect to the evident intention of the parties.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the parties to this suit be placed on the tableau of distribution of J. K. Smith, and paid as follows, that is to say, Emilie Trudeau, minor heir of Zenon Trudeau, the sum of five thousand, three hundred and fifty seven dollars, fourteen and a half cents, with interest on the one third of that sum, from the first of April, 1820, on one other third part of the same, from the first of April, 1821, and on the remaining third, from the first of April, 1822, it being the one seventh of the half of the money due for the plantation, sold by the heirs of Trudeau, to J. H. Smith; that James Morrison be placed in said tableau, as a creditor, for the sum of fifteen

thousand dollars with interest, at six per cent. from the 31st. of March, 1820, until paid, and costs of suit That the widow, and other heirs of Zenon Trudeau, be placed there as creditors for the balance due on the price of the plantation, after deducting the sum of five thousand, three hundred and fifty seven dollars, fourteen and a half cents, coming to the minor, that is to say, for the sum of sixty nine thousand, six hundred and forty two dollars, and eighty six cents, with interest, at six per cent. until paid, on the one other third of said sum, from the first of April, 1820, on one other third part of said sum, from the first of April, 1821, and on the remaining third, from the first of April, 1822. And lastly, that James Whitehead be placed thereon as a creditor for fifteen thousand, four hundred and twenty two dollars, and ninety four cents, with interest, at the rate of six per cent. from the 17th of June, 1820, until paid, that the said creditors be paid in reference to the order beforementioned, that is to say, first Emilie Trudeau, second, James Morrison third, the widow and heirs of Z. Trudeau, and lastly, James Whitehead, and it is further ordered, adjudged, and decreed, that the appellee pay the costs of the appeal.

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Hennen & Hawkins for the plaintiffs, *Duncan* for the defendant.

CHURCH WARDENS & AL. vs. *PEYTAVIN.*

APPEAL from the court of the second district.

A penalty cannot be superadded to the damages.

It is forfeited by the debtor's delay only, even in the case of the payment of money.

Under a prayer for general relief, the rent of the premises may be allowed.

MARTIN, J. delivered the opinion of the court. The plaintiffs seek to enforce a clause, in the defendant's lease, by which he bound himself, at the expiration of every year, to pay the rent, at the domicil of the treasurer of the church; and it was agreed that on failure, the lease would become void and of no effect, and the lessee bound to pay for damages, a sum of five hundred dollars, for the benefit of the church.

It is admitted that the yearly rent of two hundred and fifty dollars became payable on the 19th of March, 1822, and that it was not paid and is still unpaid—that on the 8th of April following, the attorney of the plaintiffs wrote to the defendant to demand the five hundred dollars and a rescission of the lease, and filed the petition, in the present case; that afterwards, but on the same day, the defendant offered to pay the rent to the plaintiffs' counsel, which was not accepted.

Reynaud deposed the defendant left home, for New Orleans, about the 15th of March, 1822, leaving him to attend to the payment of the rent—that a few days after, he called on the treasurer to inquire, when it would become due—that the treasurer said, he could not then tell, but would ascertain it, and inform him—that on the next day he received from the treasurer a copy of the lease—the deponent discovering the rent became payable on that, or the following day, informed the treasurer he would attend to the payment—that the defendant returned on the 6th or 7th of April, and the deponent neglected informing him of the rent being due—that on the 8th, the deponent met the treasuref at the church, about a couple of hours, after the defendant received the letter from the plaintiff's counsel, and offered to pay the rent, which the treasurer said, he could not, nor would not accept. It was then between 9 and 11, A. M. The petition was filed on the same day and served on the 10th; after the service, the deponent waited on the treasurer and offered to pay the rent, interest and costs, which he refused to accept.

The district court gave judgment for five

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hundred dollars, and decreed the rescission of the lease—The defendant appealed.

The injury, which the plaintiffs have received, results from the neglect of the defendant, to pay them a sum of two hundred and fifty dollars, which became due on the 19th of March, and remained unpaid on the 8th of April following, when the present suit was commenced.

It is true, the defendant bound himself to pay two hundred and fifty dollars, by way of of damages, if he did not pay the rent of two hundred and fifty dollars, on the day it became payable, and the law has provided, that "when the contract specifies that he, who fails to execute it, shall pay a certain sum, by way of damages, the other party can recover neither a larger nor smaller sum, *Civil Code*, 268, *art.* 52, and the wordly fathers of the parishioners appear entitled, under this provision, to the pound of flesh. But the following article (53,) makes an exception the the general rule. In obligations confined to the payment of a certain sum, the damages, arising from the delay in the execution, *are never* adjudged to exceed the interest fixed by law, except where particular rules of commerce and suretyship govern the

case. They are due only from the day they are demanded, except when the law makes them accrue of right.

It seems to us, the defendant cannot be compelled to pay one hundred per cent. on the two hundred and fifty dollars, which he was bound to pay on the 19th of March, and which the plaintiffs' officer refused to accept, on the 8th of April following, unless one hundred per cent. were paid for the delay.

The rescission of the lease is prayed for, and was decreed. This is *quasi* a *penalty*, and the clause of the lease in which it is stipulated, is in the nature of a *penal* one. A penal clause is that by which a person, to secure the execution of an agreement, binds himself in something, in case of non execution. *Ib.* 284, *art.* 126. The penalty cannot be *superadded* to the damages; for these are the *compensation* for the damages, which the creditor sustains. *Ib. art.* 129.

In obligations, confined to the payment of a certain sum, the penalty resulting from the delay, is like damages to be reduced to legal interest. *Pothier's Obligations.*

The penalty is forfeited *only*, when the debtor is *in mora*. Even when the obligation con-

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tains a day of payment. *Civil Code*, 287, *art.* 129.

We have seen, that, in obligations to pay a certain sum, interest, by way of damages, is only due from the demand.

The district court erred in giving judgment for the five hundred dollars, and the rescission of the lease.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed.

In proceeding to ascertain what judgment the district court ought to have pronounced, we find the object of the suit is not the recovery of the rent—it was not the matter in dispute, but the exaction of the penalty, or heavy damages stipulated. But the whole case is stated, and there is a prayer for general relief —and under this, we think judgment ought to have been given for the rent.

It is therefore ordered, adjudged, and decreed, that the plaintiffs recover from the defendant, the sum of two hundred and fifty dollars, with legal interest, from the judicial demand, and costs in the district court, the costs

in this, to be paid by the plaintiffs and appellees.

Workman for the plaintiffs, *Dumoulin* for the defendant.

PACKWOOD vs. *RICHARDSON*—*Ante*, 299.

A possessor in good faith evicted, does not lose his right to be paid for improvements, by neglecting to pray for them in the answer to the petitory action.

Whether the plaintiff can have execution to deliver the object recovered, until the improvements are paid for.—*Quere.*

A possessor is not necessarily in bad faith from the time an action is commenced against him.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The judgment lately rendered in this case, in favor of the plaintiff could not be made final, until a partition of the property sued for, was made. The cause was, therefore, remanded for that purpose.

Experts were a ppointed, who divided the lots and returned a proces verbal, of their proceedings to the district court. On going before the notary, the defendant filed an opposition to the partition, on the ground that no compensation was allowed for the buildings and improvements erected in good faith on the premises. The notary sent the parties before the court, who overruled the objection, and the defendant appealed.

Two questions are presented for our decision.

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1st. Whether the defendant can be now heard on a claim of indemnity, for improvements?

And if he can, does his right extend to all the improvements put on the property, as well those made before, as those since, the present action was commenced against him?

On the first point we are clear, that the defendant has not lost his right to indemnity, by failing to set up a claim to it in the answer.

It is true, it is customary to do so, and the practice is a beneficial one, for it enables the court to do entire justice at once, and put an end to litigation; but there is no law which positively requires it, nor any rule of practice, or of pleading, which demands it. Something very positive should be shewn, to authorise us to declare a forfeiture of rights from such a circumstance. The necessity for the defendant to use this plea at all, has grown out of the decision of the court against rights which we have already declared, he was *bona fide* in using. The legal obligation to set up this defence, of course, did not previously exist. When there was no obligation, there could be no fault, and consequently there cannot be a forfeiture.

But whether the defendant can avail himself

of this defence in the present action, or is not driven to a suit to recover the value of his improvements, provided it should be seen hereafter, that any thing is due him, presents a question of more difficulty. Nothing of the kind appears on the pleadings, and it is in some measure travelling out of them, to give judgment on matters not put at issue. In an ordinary case, where the defendant failed to plead that he was entitled to the value of his improvements, and judgment was given for an entire object, we should, from our present impressions, be inclined to believe, that execution could not be suspended, in order to ascertain how much the plaintiff owed for improvements. It is proper, however, we should remark, that by the 41*st law of th* 28*th title, of the third partida*, it is expressly directed, that *before the property be delivered*, the party who succeeds must pay to the other, all that he has expended for improvements. Leaving, therefore, the decision of this point, for a case in which it will become necessary, and confining ourselves to that now before us, we observe, that it differs from ordinary cases, in this important respect; that the judgment is not final; that a partition is to be made; and that in making this partition the

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conflicting claims of the parties may be finally settled. The court sees too, from the statement signed, that the parties have already agreed upon a division, suited to every view which we can take of the right of the defendant, to the value of the improvements made by him. Under these circumstances, we are of opinion, as the whole matter in dispute, may be terminated by a partition, that it is our duty to direct it, and that we ought not to drive the defendant to an action, when we can do him justice now.

We have already declared that the defendant was a possessor *in gvod faith*, and according to our laws, such a possessor when evicted, has a right to be paid for his improvements, or to be reimbursed, a sum equal to the enhanced value of the soil. *Civil Code*, 104, *art.* 12. The counsel for the plaintiff, with great propriety, have not contested the principle, nor its application to this case, but they have urged that Packwood ceased to be a possessor in good faith, from the time suit was instituted, or at all events, from the time judgment was rendered in the district court.

According to the provisions of our Code, the person who has entered upon property with a

just title, and who is a *bona fide* possessor, ceases to be one from the moment defects are made known to him, in the title under which he holds. *Civil Code*, 104, 7. This provision leaves a considerable latitude to those who are called on to decide cases depending on that knowledge, and must frequently baffle enquiry. It makes a complete change in the former law, which declared the good faith to terminate with a suit commenced. *Domat, liv.* 3, *tit.* 5, *sec.* 3, *arts.* 8 *and* 17. *Ibid, tit.* 7, *sec.* 4, *art.* 15. *Dig. Lib.* 5, *tit.* 3, *l.* 25, *no.* 7. *Febrero, p.* 1, *chap.* 7, *sec.* 2, *no.* 85. *Par.* 3, *tit.* 28, *l.* 39, and it is somewhat inconsistent with another provision, that the buyer owes interest from the demand. *Civil Code*, 360, 84. The commentators on the French law, seem to regret that the provision was introduced into the Napoleon Code, as substituting a rule which from its arbitrary and uncertain nature, gives rise to a great deal of litigation, in place of the old and certain regulations, which made the good faith to cease from the time suit was commenced. *Toullier, Droit civil francais, no.* 3, *liv.* 2, *tit.* 2, *chap.* 1, *no* 76. *Pothier, Tratité de Propriété, no.* 342, *Ed.* 1807, *in notis.*

Called upon to apply the law to the case

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now before us, we feel a difficulty in deciding what was the state of Mr Packwood's mind, at any particular period of this transaction, or in other words, when he was convinced that his possession was unjust; for there is a great difference between knowing that a title is set up, and a knowledge that it is a good one. It is extremely embarassing for us to say. Forced, however, to decide it, we bring to our aid, the maxim that bad faith is not presumed, that it must be proved; *Domat, liv* 3, *tit.* 7, *sect.* 4, *art* 13, and that it has not been satisfactorily established, that the defendant knew Packwood had a better title than himself, at any time previous to the judgment of this court. Admitting the fact to be doubtful, this way of deciding it, best accords with the justice of the case. See *Toullier, Droit Civil, vol.* 3 *liv.* 2, *tit.* 2, *chap. no.* 77. *Pothier, traité de possession, no.* 83.

It is therefore ordered, adjudged and decreed, that the judgment of the district court confirming the partition, made before the notary, be avoided and reversed, and it is further ordered, adjudged and decreed, that a partition of the property sued for, be made as fol-

lows: by a line drawn from Magazine st. to Chapitoulas st. and equally distant at every point of it from the two sides, and from Chapitoulas st. prolonged to the river, by the line now drawn on the plan, in like manner, at equal distances from the two sides, and that the plaintiff do take the lower side, both from Magazine street, and Chapitoulas street—that a writ issue to put the plaintiff in possession of the portion herein decreed to him, and it is further ordered that the appellant pay the costs of this appeal.

It is ordered, that the judgment in this case, on the 18th instant, be corrected by substituting in place of these words, "that a writ issue to put the plaintiff in possession of the portion herein decreed to him," the following words, to wit: "that a writ issue to the sheriff, commanding him to deliver to the plaintiff, the defendant's possession, in the premises herein decreed to said plaintiff"

Smith & Mayhin for the plaintiff, *Duncan* for the defendant.

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BRYANS & AL. vs. *DUNSETH & AL.*

If the general issue, and satisfaction be pleaded, the former will be considered as waved.

An attachment lies against a non-resident although he be in the state at the time it is sued out.

If judgment has been given against one of the co-partners in a sister state, and the plaintiff sues another partner in this, he cannot recover but on terms.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. In this case, (which is a suit by attachment,) the plaintiffs set forth in their petition, as a cause of action, the sale and delivery to the defendants, of certain goods, &c. in the city of Philadelphia, on the 2d. day of October, 1817, to the value of nine hundred forty nine dollars and fifty two cents, on a credit of six months.

The answer of the defendants contains a denial of the allegations made by the petitioners; and also a plea of satisfaction, discharge or payment, evidenced by a judgment obtained in the state of Ohio, against Dunseth, a partner of the firm of Dunseth & Buckner; the principal defendant in this case; rendered on a note of hand, given by said firm, to the plaintiffs for the same debt which is now sued for; on which judgment, execution issued, and was levied on the property of Dunseth.

Judgment was given, in the court below, for the plaintiffs, from which the defendants appealed. A bill of exceptions was taken to the admissibility of the record from the state of

Ohio; but is now abandoned. The denial or general issue in the answer, being inconsistent with the plea of satisfaction, must be considered as waved by the latter, and the debt, consequently acknowledged to have been created, as alleged in the petition; but evidenced by a promissory note, executed at the time of receiving the goods, which were the consideration of said promise.

Dunseth & Buckner, it appears, were partners in commerce, at the time they purchased the merchandize from the appellees, and executed their note for the price. They are, therefore, according to the *lex mercatoria* bound to the latter in *solidum*, whether their obligation be considered as arising out of the original contract of sale, or from their promissory note; and may be sued either jointly or severally.

The contract, which is the foundation of the present suit, being made in Pennsylvania, is subject to be governed by the laws of that state; and we have it evidenced that the common law of England prevails there as the basis of its jurisprudence. According to this law, parol and simple contracts in writing, in relation to evidence, are put on the same footing. And a note in writing, without a seal, being con-

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sidered as no better evidence of a debt, than parol proof of a promise, or of such facts, on which a legal assumpsit, will be presumed. Our laws on the subject of judicial proceedings, require that a plaintiff should plainly and substantially set out his cause of action. The cause of action in the present case, is the price of the goods sold and delivered by the plaintiffs, to the defendants, on a credit of six months, on which a promise to pay at the expiration of that term, would be implied, on proof of such sale and delivery. By the laws of the country, where the contract was made, this implied promise does not merge in a simple written agreement or promise: It is merely evidence of the original debt, of the same dignity with parol proof; and the latter species of testimony, cannot be rejected on account of inferiority. The evidence against the defendants is judicial, and extrajudicial confessions. The answer admits the debt, but shews that it was evidenced by a promissory note, on which judgment had been obtained in the state of Ohio, and execution thereon issued against the property of a co-partner. Breedlove, the only witness in the case, proves the acknowledgment of Buckner, that a debt similar to the one

now claimed was contracted by Dunseth and himself, as partners in trade, with the plaintiffs; but says nothing about any promise in writing to pay it We are of opinion, that the strongest evidence, in support of the petition, is the answer of the defendants, which must be taken entire. And although the record of the proceedings in the state of Ohio against the partner does not shew any payment or satisfaction of the debt for which he is equally bound and liable to be separately sued on account thereof. Yet, as it does appear that a promissory note was given for the same debt, and as said note might be withdrawn from the court in which judgment has been rendered against Dunseth, and be made the basis of an action against his partner; to which the present recovery in the district court, could with difficulty be pleaded at the bar; we deem it our duty in deciding the cause, to provide against the possibility of the appellants being again harassed for the same cause of action. Something of the same kind is attempted in the judgment of the court below; which is objected to by the appellees, in the answer on the appeal, and which we consider not equal to meet the justice of the case.

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Before coming to a final decision, is necessary to notice an objection made by the counsel for the appellants, in his 6th and last point, to the legality of sustaining an attachment, when the defendant was within the jurisdiction of our courts, and might have been personally served with a citation, in the ordinary way of judicial proceeding. Perhaps this objection comes too late, being only made since the appeal. But in all events, we are of opinion that it cannot be supported.

Our attachment laws distinguish several cases in which an attachment will lie; and amongst them is the situation of a person who resides permanently out of the teritory or state. This remedy given in such terms, cannot be destroyed, annulled, or suspended by an accidental and transient presence of a stranger.

We do not consider the judgment of the district court incorrect in any thing, except that part of it which relates to the account which the plaintiffs are held to give, of the disposal of the property seized in execution under the judgment *vs* Dunseth; but as we are not satisfied with it in this respect, It is ordered, adjudged, and decreed, that the judgment of the court below, be avoided, annulled and re-

versed. And proceeding here, to give such judgment as ought there to have been given,

It is further ordered, adjudged and decreed, that the plaintiffs do recover from the defendant Buckner, the sum of nine hundred and forty nine dollars, and fifty two cents, with interest thereon, at the rate of six per cent. per ann. from the 2d. of April, 1818. until paid. But they shall not have the benefit of this judgment, until they produce to the court below, the note of hand which is set forth in the answer of the defendant and cancel the same, and the appellees shall pay the costs of this appeal.

Maybin for the plaintiffs, *Hawkins* for he defendants.

WILLIAMS & AL. vs. *SCH. ST. STEPHENS.*

APPEAL from the court of the first district.

A contract of pledge, in the form of one of sale, will not protect the property of the pledgor, in the hands of the pledgee, from the creditors.

MARTIN, J. delivered the opinion of the court. The plaintiffs sued for the sale of a vessel, for the payment of supplies furnished to her. Ball intervened for the same purpose. Stebbins claimed her as his property, having purchased her in New York, whither she proceed-

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ed after the supplies, for which payment was sought, had been furnished. The district court decreed her to this claimant, and Williams and Ball appealed.

The claimant introduced his vendor, as a witness, who deposed, that, finding himself in want of money to fit his vessel out, he obtained a draft for seven hundred dollars, and as a security for the proceeds, he gave the bill of sale, under which she is now claimed: and it was agreed that on the re-payment, she was to be conveyed back to him.

This testimony, offered by the claimant himself, shews the real nature of the contract, which took place between him and the former owner of the vessel. It was in fact a contract of pledge, though it received the form of a contract of sale. This fiction ought not to stand in the way of the creditors of the borrower, and the lender can only righteously avail himself of it, to secure his payment.

The plaintiff and intervening party have established their demands.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the said vessel, her tackle, apparel and furniture

be sold by the sheriff, and that the claimant Webbins be paid out of the proceeds, the sum of seven hundred dollars by him advanced, with interest from the and that the plaintiff recover the sum of one hundred and sixty eight dollars and ninety two and three fourth cents, and the intervening party, that of two hundred and sixty nine dollars, eighty three cents, with costs in the district court. Those in this, to be paid by the claimant and appellee.

Maybin for the intervening party, *Eustis* for the defendants.